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No. 85-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS, etc., *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONERS RIVER ROAD ALLIANCE, INC., ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The briefs of both the Federal respondents ("Corps Br.") and National Marine Service Inc. ("NM") present a somewhat misleading account of the record, and sidestep the Questions Presented. The reply brief redresses disingenuous aspects of the opposition briefs. The form of citations herein follows the description in the Petition (p.2, n.1).

STATEMENT OF THE CASE

Both briefs argue, disingenuously, that because the State of Illinois had, until recently, leased to National Marine "a contiguous site for fleeting," the interest of the State and the people in preventing fleeting at the site in order to preserve the aesthetic beauty of the area is undermined (Corps Br.14, 4 n.4; NM Br.3). However, neither brief acknowledges that the lease (which has been terminated by the State) allowed fleeting only during the six winter and near-winter months when tourism, recreational use of the lake, and barge traffic would be so diminished that the impact of anticipated fleeting would be de minimis. That limitation highlights, rather than undermines, the insult to the beauty of the area which would result from the Corps' action in this case.

Further, the Corps belittles the aesthetic impact, asserting that the fleeting site is "at the extreme upper end of the scenic bluffs," "not at the heart of the scenic area" (Corps Br.3,5). However, the Corps overlooks that the fleeting site extends into Alton Lake at the point where Lake and River curve at the upper end of a seven-mile stretch of unobstructed shoreline, causing the barges to be fully visible for the entire seven miles. (See D.E. I 28; Photo at App.14.) Indeed, the District Court observed that the fleeting site would constitute an eyesore for "one of the last vistas of relatively uncluttered river view." (See Transcript of hearing on 4/25/84, p.15)

Both briefs stress the conclusion of National Marine's consultant that fleeting at the proposed site would not increase the alrady existing impact on

the mussel bed (Corps Br.6; NM Br.5). However, neither brief acknowledges that the Corps explicitly rejected that conclusion (App.42). The consultant's conclusion is not "material to the consideration of the questions presented" (Rule 34(g)).[1/]

1/

National Marine's brief presents further argument which the Corps declined to support. First it characterizes the petition as arguing that the area in question "was a pristine wildlife and recreational area free of river commerce." (NM Br.3). However, as the petition stated, the area is far from pristine. A huge dam created it. Heavy tourism and recreational usage are obvious. Indeed, this intense usage increases, exponentially, the damaging impacts of the issuance of the permit. NM also argues that the petition's description of the area involved is unsupported by the record. However, as the petition made clear, the record's support for that description is in the verified complaint which served the District Court as an affidavit for summary judgment purposes. National Marine argues that those allegations were either denied or

REASONS FOR GRANTING THE WRIT

1. In substituting its own judgment for that of the agency as to "whether an environmental impact statement had to be filed," the decision below conflicts with the settled law of judicial review

The opposition briefs do not even make reference to the seminal cases cited at pages 22-24 of the Petition. Rejecting the restatement of the issue by the court of appeals (see Petition 29), the briefs seek to avoid the first Question Presented by asserting that the court of appeals did not do what it did. (E.g., Corps Br.11, NM Br.15-16).

The Corps sophistically states

1/ Cont.

subject to a motion to strike. However, the motion to strike was not sustained, and National Marine, as well as the Corps, the sponsors of the summary judgment motions, must concede that a defendant on a motion for summary judgment cannot rest upon denials in a pleading.

> it is difficult to understand how the court of appeals could have substituted its judgment for that of the Corps when it upheld the Corps' determination.

Corps. Br.11. To the contrary, it is easy to understand. When the reviewing court reaches the same result as that of the agency, on the basis of a rationale different from the agency's rationale, the reviewing court is indeed substituting its judgment for that of the agency.

As this Court held in **NLRB v. Metropolitan Life Ins. Co.,** 380 U.S.438, 444 (1965),

> For reviewing courts to substitute . . . [another]'s rationale . . . for that of the [agency] is incompatible with the orderly function of the process of judicial review.

In the process of substituting its judgment for that of the Corps, the court of appeals fashioned its own crucial factual determinations, without any counterparts in the Corps findings (see

Pet. 30-34). Neither opposition brief denies this. 2/

Notwithstanding respondents' efforts, it is still clear that the decision below rejects the principles of judicial review mandated by this Court. In urging denial of review, respondents urge that **Chenery, Metropolitan Life, Kleppe,** and their numerous progeny be set adrift. Plenary consideration is necessary to preserve this norm of judicial review, which has been painstakingly developed by this Court over many decades.

The Corps (Br.12) obscures the dis-

2/ The Corps speciously gibes: "petitioners' quibbles concerning factual findings . . . present no question warranting this Court's review" (Br.11 n.11). Of course, petitioners' point is not that the findings made by the court of appeals de novo are contrary to the record (although they are), but that the court of appeals is to review the agency decision on the basis of the findings and rationale of the Corps.

tinction between an environmental assessment (EA) and an environmental impact statement (EIS), stating that "it [is] hard to see how the Corps could have met [the district court's] objections to the adequacy of its environmental assessment without [preparing an EIS]" (Corps Br. p.12). 3/ Something less than a full-dress EIS could at least make some mention and provide some assessment of the the cumulative impact of multiple barge fleeting facilities on this scenic treasure. And of course the Corps can comply with **Kleppe, supra**, by

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3/

The substantial differences between an environmental assessment and an environmental impact statement are differences in kind, not degree. See **Township of Lower Alloways Creek v. Public Service Electric & Gas Co.**, 687 F.2d 732, 741 (3rd Cir. 1982). See also **Foundation for North American Wild Sheep v. Department of Agriculture**, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982).

taking a hard look at the impacts on aesthetics and recreation.

National Marine by way of diversion argues "This Court will readily see that the permitted activity in this case is not of such magnitude as to require an EIS" (Br.9). Others, such as the United States Fish and Wildlife Service, and the Illinois Department of Conservation, cannot see what National Marine "readily sees." The role of the reviewing court is not to "readily see" that an EIS need or need not be prepared, but to insure that the **agency** has taken a "hard look" at environmental consequences. **Kleppe, supra**, 427 U.S. at 410 n.21.

2. In establishing a new prerequisite to the preparation of an EIS, which requires that the

> **"time and expense" of preparation be "commensurate with the likely benefits,"**

the decision of the court of appeals goes far to devitalize NEPA, in

conflict with Congressional, Executive and Judicial mandates.

The Corps admits that the court of appeals erred in setting forth this "novel" test for determining whether an EIS must be prepared (Corps Br.10 n.8). Nevertheless, the Corps opposes certiorari, apparently because of a vague supposition that the court of appeals did not apply this "novel" test.

National Marine is less candid, simply denying that the Court of Appeals set forth this "novel" test. NM Br. p. 13-15).[4/]

4/

National Marine, having denied that the court of appeals superimposed upon NEPA this "novel" test, apparently contends that the test is already embodied in the regulations (NM 14-15). Significantly, the Corps does not support this contention, and in fact repudiates it by conceding that the court below erred in setting forth this novel test (Corps Br. 10 n.8). The regulations, including those quoted by National Marine, reveal that the only re-

There can be no doubt that the court of appeals did establish this "novel" test (App. 6). The Corps confession of error, unlike the error itself, will not be printed in the Federal Reporter. In the interest of efficient administration of the judicial process, and of NEPA, this Court should grant certiorari.

The Petition highlighted that, in announcing this "novel" test, the court of appeals repudiated a unanimous line of decisions of other circuits, which hold that the regulations of the Council on Environmental Quality are binding on federal agencies (38-40). Indeed, the CEQ regulation defining "significant" clearly precludes the establishment of

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4/ Cont.

reference to balancing of benefits against detriments is in a regulation relating to "the decision whether to issue a permit," not the decision whether to prepare an environmental impact statement. 33 C.F.R. § 320.4(a)(1), Petition A-6.

the "novel" economic test introduced by the court below. Only by holding the CEQ regulation to be "nondirective" could the court below establish its test.

The Corps urges (pp.12-13) that the court of appeals did not really mean that the regulation is not binding, but meant only that the regulation is "too generalized to resolve the ultimate decision as to 'significance' in any particular factual circumstance." Such contention overlooks the primary meaning of "directive," which is "regulatory." It also overlooks the fact that the "novel" economic test directly conflicts with the CEQ definition of "significant," and therefore could not be promulgated without a determination that the CEQ regulation is not binding on the agency.

The conflict between the circuits is

all too apparent on the face of the opinion below. The sophistical revision of the opinion below offered by counsel for the Corps does not dilute the need for plenary consideration of the "novel" test in order to avoid frustration of the overriding mandates of this Court.

3. In ruling that an administrative agency need not consider alternatives, the decision below conflicts with the statute, the regulations, and the decisions of other courts of appeals.

The Petition, in support of the third Question Presented, submitted that that the court below rationalized the Corps' failure to evaluate alternative sites by (1) noting that the applicant found no suitable alternatives, and (2) asserting that the Corps is not required to go beyond the applicant's findings, because the plaintiffs were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site." The

plausible alternative site." The Petition further clarified that the decision of the court below thus conflicts with two well established lines of cases.

Both briefs in opposition attempt to mitigate these conflicts by focusing attention on the Corps, rather than the decision of the court of appeals.[5/] They argue that in fact the Corps "independently reviewed the study by National Marine" (Corps Br.17) and that "alternatives were considered" by the Corps (NM Br.11).

5/

The Corps sets up (pp.15-18) a number of strawmen around this issue. No one has suggested that the Corps must "undertake to locate . . . the optimum site" for a new barge fleeting facility; however, NEPA requires that the Corps study, develop and describe alternatives before granting this permit. No one contends that the Corps has or should have the "business expertise to make locational decisions for National Marine"; however, NEPA

Even if that were correct, certiorari

5/ requires that the Corps develop sufficient environmental expertise to evaluate alternative sites before granting a permit. No one contends that the Corps can force riparian owners to grant riparian rights; however, riparian rights are available for a price, and the applicant's unwillness to pay the price does not justify the Corps' refusal to evaluate alternative sites. Petitioners do not contend that the Corps violated NEPA by accepting and using the study prepared by National Marine's consultant; however, NEPA precludes reliance upon the consultant's study exclusively, and requires that the Corps itself study, develop and describe alternatives, after studying the study of the consultant. No one contends that National Marine's "location needs" (Br. 17) were not factors that the Corps properly took into account; the point is that the Corps took no other factors into account at all, and made not even a pretense of studying, developing or describing alternatives. Petitioners do not contend that they do not "bear the burden of demonstrating that reasonable alternatives were not considered" (Br. 17); they have borne that burden, as is demonstrated by the District Engineer's admission that "several prospective fleeting sites could be found as alternatives" (App. 58), and his failure to study, develop, or describe any one of them.

should be granted; the decision below would be a mischievous precedent, which would go far to devitalize NEPA. But the argument is not correct. The court of appeals far more accurately summarized the Corps ruling. In fact, the Corps did not evaluate alternative sites (or at least the Corps failed to articulate any evaluation), beyond pointing out that, to the extent that the subject site is used as a parking lot for barges awaiting repair in the Grafton repair yard, the subject site would offer advantages in terms of operating efficiencies and reduced fuel consumption (App. 58). No effort was made by the Corps at any time to evaluate other sites in terms of their aesthetic or other impacts, and balance those impacts against the impacts of the subject site.

The decision of the court below conflicts with all reported decisions on

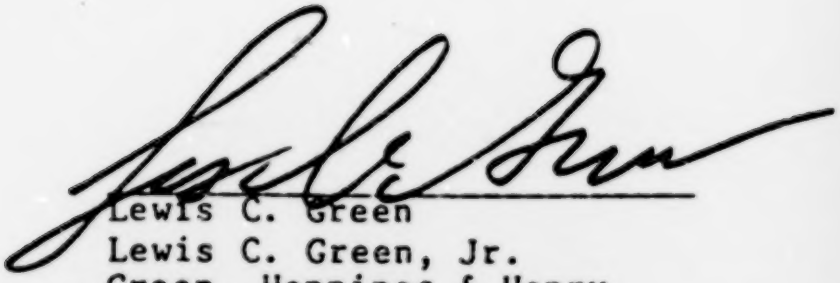
the points set forth in the Petition.

CONCLUSION

On each of the three Questions Presented, the briefs in opposition are ineffective to alter the fact that the decision below fundamentally changes the norm of judicial review, and goes far to devitalize NEPA and its implementing regulations, in conflict with the decisions of the courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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